



November 4, 2002

Mr. Thomas Bailey
VIA Metropolitan Transit
P. O. Box 12489
San Antonio, Texas 78212

OR2002-6280

Dear Mr. Bailey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171631.

The VIA Metropolitan Transit (the "VIA") received a request for access to "internal audits, internal reviews, [and] internal investigations completed since January 1, 2001." You state that VIA will release some responsive information to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that one of the submitted reports, report number 33, was created before January 1, 2001. Thus, report number 33 is not responsive to the request. Accordingly, we need not address whether report number 33 is subject to disclosure under the Public Information Act (the "Act").

Next, we note that the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). The information at issue constitutes completed reports and investigations that are encompassed by section 552.022(a)(1). Thus, these reports and investigations must be released to the requestor, unless they are confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Although VIA claims that some of these reports and investigations are excepted from disclosure under section 552.111 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act and, as such, does not constitute "other law" that

makes information confidential.¹ Accordingly, we conclude that VIA may not withhold these reports and investigations under section 552.111. However, since VIA claims that some of these reports and investigations are excepted from disclosure under sections 552.101 and 552.108 of the Government Code, we will address the applicability of those exceptions to disclosure to the submitted information.

We note that portions of the information at issue are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. In addition, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Thus, the information that we have marked as subject to the MPA may only be disclosed in accordance with the access provisions of that statute. Absent the applicability of an MPA access provision, we conclude that VIA must withhold this information pursuant to the MPA.

You claim that the information at issue, or portions thereof, may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with other statutes. We

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

note that section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). VIA has not asserted any law, and this office is not aware of any law, that makes any portion of the remaining information at issue confidential under other statutes. Accordingly, we conclude that VIA may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code in conjunction with any other statute.

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy. Information is protected from disclosure under the common-law right to privacy if it meets the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) it contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial choices concerning insurance and designation of beneficiary of employee's retirement benefits generally confidential), 545 (1990) (common law privacy protects personal financial information).

We note that in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. *See Ellen*, 840 S.W.2d at 525. After carefully reviewing your arguments and the information at issue, we find that none of the

reports or investigations concern allegations of sexual harassment. Thus, we do not believe that *Ellen* is applicable in this instance to any of the submitted documents. Furthermore, we find that there is a legitimate public interest in all of the allegations contained within each report and investigation. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). However, we also find that there is no legitimate public interest in some information that is intimate and embarrassing or which consists of personal financial information. Accordingly, we conclude that VIA must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that a portion of the information at issue is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

...

- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted . . . if:
 - (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code 552.108(b)(1). Generally, a governmental body claiming section 552.108 as an exception must demonstrate how and why release of the requested information would interfere with law enforcement. See Gov't Code § 552.108(a), (b), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that this office has stated that procedural information related to law enforcement may, under some circumstances, be withheld under section 552.108 or its statutory predecessors. See, e.g., Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (forms indicating location of off-duty police officers), 413 (1984) (security measures to be used at next execution), 341 (1982) (Department of Public Safety drivers' licenses forgery detection

procedures), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime).

You state that report number 32 contains references to the manner and means by which the methodology of providing security is prioritized by VIA. However, after carefully reviewing your arguments and the information contained in report number 32, we find that VIA has failed to sufficiently demonstrate how the release of any information contained in that report would interfere with law enforcement and crime prevention. *See* Gov't Code § 552.108(b)(1). In fact, it appears from our review that report number 32 only pertains to an investigation of partiality in awarding a specified contract. Accordingly, we conclude that VIA may not withhold any portion of this report under section 552.108 of the Government Code. *See* Open Records Decision No. 211 at 3 (1978).

We note that portions of the information at issue may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld under section 552.117(1) if the official or employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that VIA must withhold the information that we have marked pursuant to section 552.117(1) of the Government Code if the current or former employees to whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to VIA's receipt of the present request. Otherwise, VIA must release this particular information to the requestor.

Nevertheless, these employees' social security numbers, as well as the social security numbers of other individuals noted in the information at issue, may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622

(1994). VIA has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution VIA, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, VIA should ensure that they were not obtained or are not maintained by VIA pursuant to any provision of law enacted on or after October 1, 1990.

We also note that portions of the information at issue are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130.* Accordingly, we conclude that VIA must withhold the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state.

Finally, we note that portions of the information at issue appear to be protected by copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See Attorney General Opinion JM-672 (1987).* However, a governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, we need not address whether report number 33 is subject to disclosure under the Act, since it is not responsive to the request for information. VIA must withhold the information that we have marked pursuant to the MPA, absent the applicability of an MPA access provision. VIA must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. VIA must withhold the information that we have marked pursuant to section 552.117(1) of the Government Code if the current or former employees to whom this information is associated requested confidentiality for this information in accordance with

section 552.024 prior to VIA's receipt of the present request. Nevertheless, these employees' social security numbers, as well as the social security numbers of other individuals noted in the information at issue, may be confidential under federal law. VIA must withhold the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state. VIA must release the remaining submitted information to the requestor in compliance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 171631

Enc. Marked documents

cc: Mr. Joe Ellis
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(w/o enclosures)